STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Michael R. Smolenski, Presiding Justice

WEXFORD MEDICAL GROUP,

Petitioner-Appellant,

v

CITY OF CADILLAC,

Respondent-Appellee.

Supreme Court No. 127152
Court of Appeals No. 250197
Michigan Tax Tribunal No. 00-276304

_____/

BRIEF ON APPEAL OF McLAREN HEALTH CARE CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

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BRIEF ON APPEAL OF
McLAREN HEALTH CARE CORPORATION
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER-APPELLANT
WEXFORD MEDICAL GROUP

I. INTRODUCTION TO McLAREN HEALTH CARE

Amicus curiae, McLaren Health Care Corporation, is a Michigan non-profit corporation, based in Flint, Michigan. McLaren Health Care Corporation supports the position of Petitioner-Appellant, Wexford Medical Group ("Wexford"), in its request for a reversal of the unpublished *per curiam* decision of the Court of Appeals, of August 24, 2004, in Wexford Medical Group v. City of Cadillac (Docket No. 250197). *A copy of the decision of the Court of Appeals is attached to this Brief as Exhibit B.*

The Court of Appeals accepted findings of the Michigan Tax Tribunal that Wexford was organized as a non-profit entity, whose mission was to provide charity care to its community and that Wexford was in fact operated consistently with its charitable mission. The Court of Appeals nonetheless found that the real and personal property used by Wexford in its clinic in Cadillac, Michigan, was not exempt from property tax.

The decision of the Court of Appeals ignores the standards contained in MCL 211.7o and MCL 911.9(a) for tax exemption of property used for charitable purposes (the "Charitable Exemption") and the standards contained in MCL 211.7r for tax exemption of property used for public health purposes (the "Public Health Exception"). The decision equally ignores considerable precedent established by this Court and by other courts of appeal. The decision also fails to recognize the manner in which health care services are

provided in Michigan. If affirmed the decision would impact McLaren Health Care Corporation, and **it would seriously impair access to health care in Michigan**.

McLaren Health Care Corporation is the "parent" to four non-profit, acute-care hospitals located in mid-Michigan, McLaren Regional Medical Center (in Flint) , Lapeer Regional Medical Center (in Lapeer), Bay Regional Medical Center (in Bay City), and Ingham Regional Medical Center (in Lansing). McLaren Health Care Corporation is also the "parent" to several additional Michigan non-profit entities, which provide long-term acute care, home health services, hospice services, behavioral health services, and primary care services to patients in their respective communities.[1] These entities include: Bay Special Care Hospital, Visiting Nurse Services of Michigan, and McLaren Medical Management, Inc. (together with the four hospitals, "McLaren Health Care").[2]

All of the entities of McLaren Health Care are operated on a non-profit basis, and all have been granted exemption from federal income tax as charitable organizations, under 26 USC 501(c)(3) of the Internal Revenue Code of 1986. Each of the McLaren Health Care entities and McLaren Health Care Corporation itself is, through its corporate articles of incorporation, committed to promoting the quality of care and the general health and welfare of their communities and to engaging in charitable, scientific, educational, and research activities designed to promote the health of the public in a non-profit manner.

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[1] Each of these entities is a non-profit corporation, established on a membership basis, and McLaren Health Care Corporation is the sole member of each entity.

[2] McLaren Regional Medical Center and McLaren Medical Management, Inc. are parties to Court of Appeals Case No. 244386, decided in conjunction with the present case. The application for leave to appeal to this Court in SC Case No. 127118, by McLaren Regional Medical Center and McLaren Medical Management was held in abeyance by this Court, pending the ruling herein.

Part of the McLaren Health Care commitment is met through the operation of twenty-seven primary care clinics located throughout mid-Michigan. The McLaren Health Care clinics are operated as non-profit facilities by these non-profit subsidiaries of McLaren Health Care Corporation.

McLaren Health Care Corporation files this brief *amicus curiae* on behalf of itself and on behalf of all of the entities of McLaren Health Care. This brief is filed in part in response to the decision of the Michigan Supreme Court at 472 Mich 889 (2005), granting the application for leave to appeal filed by Wexford. In its decision the Court stated that other parties interested in the determination of the questions at issue could move to file briefs *amicus curiae.* All of McLaren Health Care has such an interest.

The McLaren Health Care clinics are similar to the Wexford clinic; the McLaren Health Care clinics are owned and operated by non-profit entities, consistently with their purposes to provide charitable health care to their communities. McLaren Health Care supports the appeal of Wexford in the knowledge that the McLaren Health Care clinics – and simultaneously the communities served by those clinics – will be subject to the results of the decision in this case.

McLaren Health Care Corporation urges this Court to consider the language of the statutes that establish the Charitable Exemption and the Public Health Exemption and to rule that the decision of the Court of Appeals is not supported by the statutory language or by decisions of this Court. Further, McLaren Health Care Corporation submits that this Court should reject the decision of the Court of Appeals, on the basis that the decision uses arbitrary and unpredictable standards for application of the Charitable Exemption and the Public Health Exemption.

II. ARGUMENT

A. THE DECISION OF COURT OF APPEALS IS NOT BASED UPON STATUTE OR PRECEDENT AND EXCEEDS ITS AUTHORITY.

1. Introduction. In its decision granting leave to appeal the Court requested the parties to brief three particular issues: (1) whether petitioner has demonstrated that it is entitled to the charitable institution exemptions set forth in MCL 211.7o and MCL 911.9(a); (2) whether petitioner has shown that it is entitled to the public health exemption under MCL 211.7r; and (3) whether the Michigan Tax Tribunal or the judiciary may impose a threshold level of charitable care or public health services when the Legislature has not done so.

McLaren Health Care Corporation is not privy to the details of the operations of the Wexford clinic or to judge whether those operations qualify the Wexford clinic for the Charitable Exemption or the Public Health Exemption. However, in the face of the findings of the Tax Tribunal, findings accepted by the Court of Appeals, there is no basis for denying exemption. As the Supreme Court indicated in its grant of the Wexford Application for Leave to Appeal, there is real question about whether the Tax Tribunal or the courts are permitted to impose threshold qualifications upon property eligible for tax exemption, when the qualifications are nowhere found in the statutes establishing the exemptions.

2. The Court of Appeals Created an Unprecedented Definition of "Charitable". In considering the Charitable Exemption sought by Wexford, the Tax Tribunal and the Court of Appeals decided that Wexford did not provide sufficient no-charge care to render its services "charity" care. These decisions also found that, because Wexford received the payments for medical services from government programs, such as

Medicare and Medicaid, Wexford's provision of the services did not qualify as charity care – even though the payments were conceded to be less than Wexford's costs for providing the services. **Apparently, these tribunals would find the Charitable Exemption applicable only if the provider of the services provided its services entirely without compensation.**

These rulings of the lower tribunals are not supported in the statute, MCL 211.7o. Under the statute the Charitable Exemption is available to **"Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated...."** The standard is:

(1) ownership and occupation of the property;

(2) by a nonprofit charitable institution; and

(3) use of the property by the institution solely for its stated purposes.

There was no question about whether Wexford owns and occupies the property. However, the Court of Appeals determined that Wexford is not a "charitable institution".[3]

The Court of Appeals reached its conclusion, by defining "charity" to mean only the provision of services at no cost to the recipients. Further, the Court determined that the institution must provide an undefined, but sufficient quantity of no-cost services to be considered a charitable institution. The Court found that any payment for services

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[3] It is possible that, in deciding that Wexford was not a "charitable institution, the Court of Appeals was inartfully, but simultaneously, addressing both the second and third "prongs" of the statutory elements. If so, the discussion in this brief about Wexford as a charitable institution would apply equally to Wexford's charitable use of its property. In mixing these two elements for exemption of MCL 211.7o, the analysis of the Court of Appeals was deficient. See, Huron Residential Services for Youth, Inc. v. Pittsfield Charter Township, 152 Mich App 54, 60; 393 NW 2d 568 (1986).

removed the institution (or its services) from being considered charitable, even when the payment, such as payment from the Medicare and Medicaid programs, was admittedly below the costs of providing the services.

In creating its own definition of "charitable", the Court of Appeals grafted onto the statute, MCL 211.7o, its own, new requirements for Charitable Exemption. Nothing in the statute requires that the institution be deemed "charitable" only if it provides services entirely without payment.

The Court of Appeals ignored the long-established definitions of "charitable" of this Court.[4] In 1940, this Court held in Auditor General v. R.B. Smith Memorial Hospital Assn, 293 Mich 36, 38; 291 NW 213, that a not-for-profit organization with the express purposes of promoting the general welfare without discrimination **is a charitable or benevolent organization for tax exemption purposes:**

> ...any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, extending its benefits without discrimination as to race, color, or creed, is a charitable or benevolent organization within the meaning of the tax exemption statutes.

In Michigan Baptist Homes & Development v. Ann Arbor, 396 Mich 660, 671; 242 NW 2d 749 (1976) and echoing Auditor General, this Court described that qualification for tax exemption meant that the "...charity or benevolence benefit the general public without restriction."

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[4] The reasoning of the decision of the Court of Appeals is taken solely from its decision in ProMed Healthcare, Inc. v. Holly Township, 249 Mich App 490; 644 NW 2d 47 (2002), which decision represented a departure from the existing body of case law, from this Court and from other courts of appeal, and from the statutory standards.

The description of "charity" of this Court in Retirement Homes of Detroit v. Sylvan Township, 416 Mich 340, 348-349; 330 NW 2d 682 (1980) repeated the requirement that the charity must be to an indefinite number of people:

> Charity is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint....

Nowhere among these definitions is there a requirement, such as that imposed by the Court of Appeals, that "charity" services must be no-cost services.

And nowhere in these definitions is there a prohibition, such as that imposed by the Court of Appeals, upon receiving any compensation for services provided. No such prohibition exists; the precedent is to the contrary. As early as 1904, this Court held that payment for charitable services does not automatically defeat tax exemption on charitable grounds:

> ...a non-profit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services.
>
> Michigan Sanitarium & Benevolent Association v. Battle Creek, 138 Mich 676, 683; 101 NW 855 (1904).

This Court has subsequently confirmed the position in Michigan Sanitarium, that receipt of payment for services does not defeat the Charitable Exemption. See, Gull Lake Bible Conference Ass'n v Ross Twp, 351 Mich 269; 88 NW2d 264 (1958), which quoted Auditor General, saying "...the fact that a charge is made for benefits conferred, against those who are able to pay, in no way detracts from the charitable character of an organization." Auditor General, supra, 293 Mich at 39. See, also, Retirement Homes, supra, 415 Mich at fn. 15.

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In creating its own standards for obtaining the Charitable Exemption, the Court of Appeals failed entirely to consider findings of fact made by the Tax Tribunal, findings of fact that support the qualification of the Wexford clinic for the Charitable Exemption. The Tax Tribunal found that, "Petitioner extends charity care and indigent services, and has an open-acceptance policy for Medicare and Medicaid patients." This finding confirmed that Wexford provided its charity care and provides the care to "an indefinite number of persons. *Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 3, at Finding of Fact number 10.*

The Court of Appeals denied the Wexford property Charitable Exception based upon its own determination of what constitutes "charity" care. The determination of the Court of Appeals contradicts the meaning of "charity" established by this Court.

3. **The Requirement of the Court of Appeals Adopts the Discredited "Quantum" Test for an Exempt Use of Property.** The Court of Appeals did not simply re-define "charity" as being without charge; the Court also determined that Wexford did not provide a "sufficient" quantity of such "charity" care. In effect, the Court of Appeals was resurrecting the "quantum" measurement that has been considered and rejected by other panels of the Court of Appeals.

The "quantum of use" test was initially considered with respect to exemption for educational purposes, in Lake Louise Christian Community v. Hudson Township, 10 Mich App 573, 580; 159 NW 2d 849 (1968). In Lake Louise, the Court ruled that the frequency of use of the property and the amount of the property being used for the educational purposes were insufficient to warrant exemption. In National Music Camp v. Green Lake Township, 76 Mich App 608, 610-11; 257 NW 2d 188 (1977), the Court found **the "quantum" test**

inappropriate, too stringent, and outdated to use as a measurement for qualifying for and educational exemption.

In Institute in Basic Life Principles, Inc. v. Watersmeet Township (After Remand), 217, Mich App 7, 19; 551 NW 2d (1996), the Court rejected the "quantum" test for exemption for religious purposes. Instead, the Court adopted the test used in National Music Camp – whether the entire property was **used in a manner consistent with the purposes of the institution.** In so holding, the Court of Appeals ruled that such an analysis "**...more closely conforms with the requirement under the exemption statute...**"

The "quantum" test has also been rejected in the context of the Charitable Exemption in Chauncey and Marion Deering McCormick Foundation v. Wawatam Township, 196 Mich App 179, 187 ; 492 NW 2d (1992). In McCormick Foundation the Court also adopted the reasoning of National Music Camp and rejected the "quantum test" and determined that the Charitable Exemption was available for the property, because the Foundation was using the property consistently with its stated purposes.

In Wexford the Court of Appeals did not merely impose a "quantum of use" test upon the Wexford property. The Court insists upon sufficient use, not for Wexford's stated purposes, but for the giving of "charity" care, as defined by the Court – the giving of services without compensation. As described above, it is a definition not supported by precedent. Further, it is not a measure that reflects the statutory standards for exemption.

4. The Court of Appeals Failed to Apply the Statutory Standards for the Charitable Exemption. MCL 211.7o, from which the Charitable Exemption emanates, contains three elements for determining whether the Charitable Exemption is

applicable to particular property, quoted above. Accepting that Wexford does own and occupy the property at issue, the remaining issues should be (i) whether Wexford is a charitable institution and (ii) whether Wexford uses its property solely for the purposes for which it was incorporated. The Court of Appeals engaged in no consideration of these issues.

In determining whether an organization is a charitable institution, the correct inquiry is a review of the petitioner's articles of incorporation. Holland Home v. City of Grand Rapids, 219 Mich App 384, 401; 557 NW 2d 118 (1996), citing Gull Lake. In Gull Lake, the court flatly stated that, in determining a party's purposes, "...we must not overlook, but rather **be largely governed by the purposes set forth in its Articles for its incorporation."** 351 Mich at 275.

Here, the Court of Appeals engaged in no discussion whatsoever of the charitable purposes for which Wexford was incorporated. The absence of such discussion was particularly noticeable, because the Tax Tribunal had made findings of fact with respect to the stated purposes of Wexford, as contained in Wexford's Articles. Those findings of fact included Wexford's incorporation for charitable purposes and its actual charitable activities, consistent with its charitable purposes.

The Court of Appeals similarly did not discuss whether Wexford used the property for the purposes for which Wexford was incorporated, again ignoring the statutory standard. And again, the Court of Appeals ignored findings of fact by the Tax Tribunal that Wexford did in fact use its property for its stated purposes. *Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 3, at Findings of Fact.* In totally disregarding the relevant findings of fact, the Court of Appeals also disregarded the statutory standard that, to measure

whether property should be exempt, the tribunal should consider whether or not the property **is used solely for the institution's stated purposes.**

5. The Court of Appeals Created New Qualifications for Public Health Exemption, Ignoring the Statute. The Court of Appeals also did not find that the Wexford clinic property qualified for exemption under the Public Health Exemption. Generally, the Court of Appeals based the denial of the Public Health Exemption on the grounds that, "...Wexford's operations parallel a typical private medical clinic, rather than an organization that provides public health services." The Court reached this conclusion by the simplistic logic that, if medical services are provided to individuals (apparently regardless of the number of individuals who receive such individual services), rather than to the public "at large", the services cannot qualify as "public health."[5]

The Public Health Exemption is found in MCL 211.7r and exempts from tax property **"...owned and occupied by a nonprofit trust and used for hospital and public health purposes...."** There was no issue that Wexford was a "nonprofit trust,"[6] so that the Court of Appeals began with considering the meaning of the term "public health". The Court of Appeals quoted from Rose Hill Center, Inc. v. Holly Township, 224 Mich App 28, 33; 568 NW 2d 332 (1997), which quoted from the *American Heritage Dictionary: Second College Edition* for a definition of "public health":

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[5] This conclusion is found in the opinion of the Court of Appeals in its discussion of the activities of McLaren Medical Management, Inc., in Docket No. 244386, which was rendered in the same opinion as the Wexford decision.

[6] The Court of Appeals did not discuss whether or not Wexford qualifies as a "nonprofit trust;" however, the Tax Tribunal recognized Wexford as a nonprofit trust, based upon the broad definition of the given to the term by this Court in Oakwood Hospital Corporation v. City of Dearborn , 385 Mich 704, 708; 190 NW 2d 105 (1971). *See, Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 20.*

> [t]he art and science of protecting and improving community health by means of preventative medicine, health education, communicable disease control, and the application of the social and sanitary sciences.

Having defined "public health", this Court then failed to apply the definition. The Court simply and immediately concluded that public health services could never be provided in a clinic setting.

The Tax Tribunal included in its Findings of Fact that Wexford's services included "...preventative medicine, health education, and communicable disease control." *Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 3, at Finding of Fact number 17.* The Court of Appeals did not question the finding; the Court did not address the finding. The Court seemed to believe that the nature of the services was irrelevant, because Wexford's operations parallel those of a "typical medical practice, rather than an organization that provides public health services." Thus, the Court of Appeals concluded that public health services cannot be considered public health services, when the services are provided in a private clinic.

The Court of Appeals attempted no discussion of the correct setting for providing preventative medicine or health education or communicable disease control, taken from precedent, statute, or its own understanding. It ignored the finding that the Wexford clinic actually did provide preventative medicine services and health education and disease control. The Court just concluded that public health services were not possible in a clinic.

In failing to analyze the services of Wexford, the Court of Appeals entirely ignored the standard stated in the statute, a standard that bases the exemption upon the character of the services. The Court of Appeals created its own qualification for the

Public Health Exemption – a qualification based upon the setting in which the services are rendered.

6. The Tax Tribunal and the Court of Appeals Engage in Improper Interpretation of Statutes, When the Interpretation Modifies the Intent of the Statute and Is Not Supported in the Statute..

In determining that the property of the Wexford clinic was not exempt from property taxes, the Court of Appeals (i) failed to apply the standards contained in the MCL 211.7o and MCL 211.7r; and (ii) invented unique standards for qualifying for exemption; and (iii) engaged in statutory interpretation where none was needed.

The principal concerns of the Court of Appeals were that the Wexford clinic did not provide sufficient no-charge services and that the clinic resembled a private physician's clinic. These are standards nowhere found in the statute or in established precedent. In importing these standards into the statute, the Court of Appeals failed to apply the facts to the law as it exists. Instead, the Court of Appeals construed the statutes to change them, to conform to a notion not suggested in the statutes. The exercise went beyond the role of the court.

"It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate." Melia v. Employment Security Commission, 346 Mich 544, 561-562; 78 NW 2d 273 (1956). Here, the Court of Appeals substituted its own standards qualify for exemption for the elements contained in the statutes. Neither MCL 211.7o nor MCL 211.7r requires that the petitioner provide only no-cost services to the public. Neither statute requires that the applicant receive no compensation, from government or any other sources, for the services it provides to the public. Neither statute requires that the property, as used by the charitable institution, resemble the property of some other, undefined form of charitable institution.

Each of the Court of Appeals requirements for the Charitable Exemption and for the Public Health Exemption is an invention of the Court of Appeals and of the Tax Tribunal. These requirements are not based upon language of the statutes. In imposing these requirements, the Court of Appeals has ignored the language of the statutes and, consequently, the legislative intent.

Construction of a statute that "...has no foundation in the statute at issue and modifies and contradicts the language of the statute..." is invalid. Guardian Industries Corporation v. Department of Treasury, 243 Mich App 244, 254; 621 NW 2d 450 (2001).

The primary goal of judicial interpretation of statutes is to give effect to the Legislature's intent. Farrington v. Total Petroleum, Inc., 442 Mich 201, 212; 501 NW 2d 76 (1992). The intent of the Legislature is found initially in the language of the statute. Mayor of the City of Lansing v. Michigan Public Service Commission, 470 Mich 154, 164; 680 NW 2d 840 (2004).

The Court of Appeals has engaged in statutory interpretation, where no interpretation was needed. The statutes that establish the Charitable Exemption and the Public Health Exemption, MCL 211.7o and MCL 211.7r, are clear on their face. They provide for exemption from property taxes for property owned and used solely for the stated purposes of a charitable institution. They provide exemption for property used by a nonprofit trust for public health purposes. This is not a case in which there is any question about whether the Legislature intended to create exemption.

Further, these statutes contain the elements determined by the Legislature to establish qualification for exemption. There was no need for the Court of Appeals to substitute its own requirements for those contained in the statute.

Where the language of a statute is not ambiguous, judicial construction is not required nor permitted. Turner v. Auto Club Insurance Association, 448 Mich 22, 27; 528 NW 2d 681 (1995). Here, the Court of Appeals engaged in judicial construction without determining that the statutes are ambiguous.

7. **Conclusion: The Ruling of the Court of Appeals, Denying Wexford Exemption from Property Taxes Incorrectly Applied the Law.** The decision of the Court of Appeals, denied exemption for the Wexford property with a decision that has little basis in the applicable statutes, MCL 211.7r and MCL 211.7o. The decision equally has little basis in precedent from this, or any other, Michigan court. It is a decision that should be reversed by this Court.

B. THE DECISION OF THE COURT OF APPEALS IS NOT SUPPORTED BY THE EVIDENCE.

1. **Introduction.** The ruling of the Court of Appeals, denying exemption for the Wexford clinic, is not, as discussed above, grounded in law. The ruling similarly is not supported by material and competent evidence. The evidence actually demonstrated that the Wexford is a **non-profit clinic, like other non-profit clinics, different from the typical private clinic**.

The Wexford clinic in Cadillac is not unique. Throughout Michigan there are non-profit organizations, like McLaren Health Care, providing health care services in outpatient clinics to patients. Such clinics are not simply "typical private medical clinics", as concluded by the Court of Appeals. Such clinics are established upon a different basis from "typical clinics", provide different services from those at a "typical clinic", and provide those services to an unlimited patient population, something not found in the

typical clinic. Such clinics, including those of McLaren Health Care are meant to be exempt from property tax.

2. The Court of Appeals Incorrectly Found No Difference Between the Organization of a Non-Profit Clinic and a Private Medical Office. The Court of Appeals found the Wexford clinic to be no different from a typical private medical clinic and so ineligible for the Public Health Exemption. In making this finding, the Court of Appeals engaged in no inquiry of the legal, organizational attributes of a non-profit entity that distinguish the entity from a typical private medical clinic.

Non-profit corporations in Michigan are created under the Non Profit Corporation Act, MCL 450.2101 *et seq.* From the moment of incorporation, non-profit entities must fulfill requirements of the State of Michigan, requirements applicable only to non-profit entities.

The most striking of these requirements and the one which most affects the day-to-day operations of a non-profit corporation is that the corporation may use its assets and "profits" only to further the purposes of the corporation. *See, MCL 450.2301.* A non-profit corporation is accordingly prohibited from paying dividends or distributing any part of its assets, income, or "profits" to its shareholders, members, officers, or directors, except upon dissolution of the corporation or if the corporation's purposes actually include providing a benefit to its members.

Seemingly in response to the concerns of the Court of Appeals that Wexford was paid by government "insurance" programs for some of the medical services it renders, the Michigan Non-Profit Corporation Act specifically limits the disposition of such payments. At MCL 450.2301 (4), the Act describes that payments received by a non-profit entity for

services rendered, even if the payments result in profit for the corporation, "...shall not be distributed to the shareholders, members, directors, or officers of the corporation." There are no exceptions to this limitation.

To complete the limitations upon the use which a non-profit corporation may make of its assets, the Non-Profit Corporation Act **flatly prohibits assets held for charitable purposes to be used for noncharitable purposes.** There is no "quantum" of noncharitable use that may be made of such charitable assets; the prohibition is complete. Accordingly, if Wexford is, through its Articles of Incorporation, constituted as a charitable organization, it may not use its assets for noncharitable purposes.

Such limitations upon the use of assets and income of the corporation immediately distinguish an entity such as Wexford from a private medical clinic. A private organization that is operated on a for-profit basis would be defeating its purposes, if it were limited in the use of its assets and income to prevent distribution of its assets and income. The profits of a private clinic may be, and usually are, distributed to the owners.

In a non-profit organization such as Wexford, the profits, if any, are returned to the clinic – to purchase needed items and to increase services to the public.[7] Such operational constraints alone distinguish the non-profit clinic from that ones with which the Court of Appeals likened the Wexford clinic.

Limitations upon the use of assets and income are not the only limitations placed upon non-profit or charitable entities by statute. In Michigan, no entity, whether or not organized on a non-profit basis, "...whose corporate purposes are to hold property for any

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[7] The Court of Appeals was also curiously offended by Wexford's aim to become profitable, as if operating at a loss were more laudable.

charitable purpose..., shall be dissolved **except by giving notice to the attorney general**" MCL 450.251. Thus, no assets held for charitable purposes may be distributed without the involvement and consent of the Michigan Attorney General.

Similarly, the Michigan Attorney General is invested with the authority to enforce proper administration of charitable trusts and their assets. The authority of the Attorney General extends to bringing proceedings for such enforcement. MCL 14.254. Again, the "private medical clinic" referenced by the Court of Appeals is not subject to such control.

As described above in the discussion of the Public Health Exemption, entities organized on a non-profit basis are subject to a number of regulatory limitations, limitations not applied to for-profit organizations. Certainly, being organized on a non-profit basis does not lead automatically to tax exemption. However, being organized on a non-profit basis does automatically distinguish an organization from other, similar, but for-profit organizations. These differences that flow automatically are the various limitations placed upon the use of the assets and income of a non-profit organization, described above.

3. **Non-Profit Clinics Are Different Operationally from Typical Medical Clinics.** It is not solely in the arena of organization and use of asset that non-profit clinics are distinguishable from a typical medical clinic. **Begin with operating losses.** In the Wexford case, the Tax Tribunal included in its Findings of Fact, "That Petitioner [Wexford] **operates at a loss**, with its parent corporations [Munson Healthcare and Trinity Health Care] subsidizing the medical care in its facilities." *Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 3, at Finding of Fact number 16.*

Wexford's losses are not unique; McLaren Health Care also suffers losses from the operation of its medical clinics. As described above, McLaren Health Care owns and

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Wexford's losses are not unique; McLaren Health Care also suffers losses from the operation of its medical clinics. As described above, McLaren Health Care owns and

operates twenty-seven primary care clinics in mid-Michigan.[8] Losses in from the McLaren Health Care clinics in each of the past two years were $8,000,000. Losses in previous years were comparable; the clinics have never been profitable. The McLaren Health Care clinics remain open only because they receive subsidies from the other facilities of McLaren Health Care. Wexford's clinic is subsidized by its parent corporations.

Despite suffering losses from providing medical services, both Wexford and McLaren Health Care continue to provide health care services in their clinics, because both have a stated commitment to promote the health and welfare of the community. A "similar" private medical clinic, such as that envisioned by the Court of Appeals, would not sustain such losses; it would revise its operations or it would close.

Wexford and McLaren Health Care sustain continuous losses, not as a result of poor management, but because they provide services that result in losses. **These are services not provided by the typical private clinic.**

For example, the clinics continue to **treat all patients without discrimination**, regardless of race, creed, religion, or ability to pay. That is, their services are offered for the benefit of an indefinite number of people without restriction.

The McLaren Health Care clinics, like the Wexford clinic, accept without restriction patients with any health insurance, including Medicare and Medicaid, or with no health insurance, and regardless of whether the insurance payment covers the costs incurred to provide the services.

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[8] The term "primary care" is normally applied to the medical care given to a patient during the patient's first point of entry into the health care system. Primary care generally provides a first diagnosis, and, for a large number of patients, the treatment needed for the ailment or condition. It generally includes physicians who specialize in family or general practice, internal medicine, obstetrics and gynecology, and pediatrics.

The Court of Appeals rejected the proposition that acceptance of Medicaid insurance is providing charity. The Court of Appeals clearly has insufficient appreciation of the significance of accepting Medicaid patients.

Medicaid provides health insurance for the most vulnerable segments of our society – children and pregnant women of low-income families, the disabled, and the institutionalized elderly. In Michigan in January 2004, approximately 1,351,108 people were enrolled in the Medicaid program. The number of Medicaid enrollees in Michigan grew by 27.4% from fiscal year 1999-2000 through January 2004, and there is every reason to believe that the growth will continue indefinitely. *Michigan Department of Community Health, Medical Services Administration, "State of Michigan Medicaid", June 2004, attached as Exhibit C.*

Although more than one million people in Michigan have medical insurance through the Medicaid program, more than one-third of Michigan's private physicians report that they do not accept Medicaid patients. The result of a survey of its members, taken by the Michigan State Medical Society, was published in the May/June 2005 issue of Michigan Medicine.[9] A copy of the survey, *2005 MSMS Physician Data, is attached at Exhibit D.* Physicians responded to the survey between November 2004 and early spring 2005. In their responses 35% of the physicians responded that they do not participate in Medicaid Qualified Health Plans.[10] *See, Exhibit D, page 15.* Of the physicians who

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[9] The Michigan State Medical Society is the statewide association that represents the allopathic physicians in Michigan.

[10] As of January 2004, more than 90% of patients enrolled in the Medicaid program, receive their benefits through participation in a managed care health plan. Managed care plans contract with medical providers, such as physicians, who agree to treat the enrolled patients for a fixed fee. *See, Exhibit B.*

reported accepting Medicaid patients, 18% reported that they will not continue to accept the patients. *See, Exhibit D, page 12.*

It is not surprising that a large percent of physicians do not treat Medicaid patients and that an increasing number of physicians will cease treating Medicaid patients. Medicaid has paid McLaren Health Care approximately 50% of the amount that other insurers pay for the same medical services. This is not a payment peculiar to McLaren Health Care; it is the Medicaid "going rate" for each type of medical service that medical providers must accept when caring for Medicaid patients.

This is an amount that does not pay for the costs incurred by McLaren Health Care in its clinics to provide the services being rendered. Wexford's evidence demonstrated a similar experience. Nevertheless, Wexford and McLaren Health Care continue to accept and treat these patients.

Medicaid payments do not cover the costs of providing the services for which the payments are made. Nevertheless, and as a result of the serious budgetary difficulties being experienced in Michigan, in February 2005 Governor Granholm issued an Executive Order, announcing an immediately-effective 4% cut in the payments to medical providers, including physicians and clinics, including non-profit clinics for medical services to Medicaid patients.

On February 17, 2005, and in response to the payment cut, Michael A. Sandler, M.D. Chair of the Michigan State Medical Society Board of Directors, wrote to Governor Granholm. *See, Exhibit E.* Dr. Sandler's letter stated that physicians in Michigan have "kept Medicaid afloat" by providing and subsidizing care for the Medicaid population for

decades". Dr. Sandler warned that the 4% reduction in payments may force private physicians to limit the Medicaid patients they accept.[11]

In a recent study published in Health Affairs, a non-partisan journal that explores health care policy issues, the conclusion was that, nationally, physicians with lower fees from the Medicaid system were less willing to accept most or all new Medicaid patients. *See, "Changes in Medicaid Physician Fees, 1998-2003, Implications for Physician Participation", at Exhibit G.*

Physicians are not charitable institutions and have no personal commitment to providing charity services, particularly the no-compensation services defined as charity by the Court of Appeals. Wexford and McLaren Health Care do have such a commitment and have not threatened to limit the services they will provide to Medicaid patients. As a result, nearly 20% of the patients treated in the McLaren Health Care clinics are Medicaid patients. This care is charity to the patient, as well as to the community – by ensuring that this large underserved population has access to competent health care services. In providing services to Medicaid patients alone, the Wexford and McLaren Health Care clinics are **different from typical private medical clinics.**

The services of McLaren Health Care, as a non-profit organization, operating non-profit clinics, also provide a significant amount of **public health care**. Although not as clear on the record, the Tax Tribunal did find that Wexford's services include preventive

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[11] The same sentiment was reflected in a recent article in the Macomb Daily, the newspaper of Macomb County, in which the President of Mount Clemens General Hospital, Robert Milewski, was quoted as saying that Medicaid patients "...can't even find a doctor." *See, Article, dated May 13, 2005, at Exhibit F, "Medicaid Cuts Fought by Doctors, Hospitals."*

medicine and communicable disease control. *Tax Tribunal decision, 2003 WL 22057560, attached as Exhibit A, page 3, at Finding of Fact number 16.*

The McLaren clinics provide to their communities free, periodic mammograms, cholesterol screenings, prostate screenings, blood pressure testing, and diabetes testing. While the Court of Appeals apparently believes that it is impossible to provide public health services to individual patients, it is difficult to define public health services without including such tests, and such tests cannot be provided to the public *en masse.* Each of these services must be provided to patients one at a time – even though they may be standing in line.

No private medical clinic offers the variety and frequency of such free tests. No private medical clinic works in the same way as McLaren Health Care to promote these free services, to ensure that the services are offered to the community as a whole. No private medical clinic incurs such uncompensated costs.

Similarly, McLaren Health Care clinics provide immunizations, particularly to children, and usually at a discounted rate, a rate that pays only for the cost of the vaccine itself. (Again these shots were provided to patients on an individual basis.) **The typical private medical clinic does not offer such no-profit services.** During the winter of 2004-2005, McLaren Health Care clinics were the largest provider of flu vaccine in Genesee County. When the County Health Department exhausted its supplies of vaccine, McLaren Health Care accepted the County burden and supplied the shots to the indigent.

Non-profit clinics provide other services to their communities, services not offered by private medical clinics. For example, the McLaren Health Care clinics offer evening and weekend hours. McLaren Health Care, like Wexford, maintains a. policy under which

patients whose income does not meet certain federal income guidelines can receive medical care without charge. Few typical medical clinics afford this possibility to patients.

Because non-profit entities are not themselves physicians, the entities recruit physicians into the communities, to serve in the non-profit clinics. The availability of physicians in a community cannot be underestimated. But few physicians elect to establish private clinics in outlying regions, because it is an expensive business and, for some time, is not profitable. Few established private practice physicians are willing to pay the expenses of supporting a new physician into their practice or into their community. However, with the support of the employment situation offered by the non-profit clinic, physicians can be brought into communities, physicians who often develop the relationships that permit them to later establish their own private practices in the community.

All of the foregoing reflects operations of McLaren Health Care that distinguish the McLaren Health Care clinics from the "typical medical practice". These services reflect the McLaren Health Care commitment to promoting the general health and welfare of the community. The commitment is part of the McLaren Health Care's non-profit purposes, purposes that are carried out in practice.

While McLaren Health Care is not part of the Wexford appeal, the record in Wexford demonstrates that the Court of Appeals might have paid attention to similar operations at the Wexford clinic. The analysis of the Court of Appeals in the Wexford case ignored similar factors in the operation of the Wexford clinic.

4. Conclusion: The Court of Appeals Failed to Consider the Facts that Supported Exemption for the Wexford Clinic. It appears that the Court of Appeals

made its ruling on the facts with the simple comparison that, in both a non-profit clinic and a private medical clinic, physicians treat patients. However, the comparison cannot be so easily made. The comparison fails to recognize that decisions about the types of care rendered, about who are to be recipients of that care, and how to use income from the care are not visible. Such comparisons should be made and are needed for consideration of whether an applicant has satisfied the statutory elements for exemption.

III. CONCLUSION: THE DENIAL OF EXEMPTION FOR WEXFORD WILL HARM CLINICS LIKE THOSE OF McLAREN HEALTH CARE AND WILL HARM ACCESS TO HEALTH CARE THROUGHOUT MICHIGAN.

In denying exemption to the Wexford clinic, the Court of Appeals has incorrectly interpreted the statutes affording the Charitable Exemption and the Public Health Exemption and overlooked critical evidence. The effects of the decision of the Court of Appeals will not be confined to the single clinic operated by Wexford. The decision will be felt throughout Michigan, because the decision will apply to all of the non-profit clinics that serve a wide range of communities.

If the requirements of the Court of Appeals for the Charitable Exemption are substituted for the statutory requirements, virtually no charitable organization that provides medical services to the public will be considered "charitable", regardless of the stated purposes of the organization, regardless of the services it provides, and regardless of the uses that it makes of its assets and revenue. No organization would be able to satisfy the requirement of providing services entirely without payment, as required by the Court of Appeals. The costs of providing medical services are enormous, and no organization providing such services, as contemplated by the Court of Appeals, would be able to afford the services for more than a few weeks.

Similarly, if the requirements of the Court of Appeals for the Public Health Exemption are substituted for the statutory requirements, the Public Health Exemption could apply only to government agencies, since only such agencies arguably operate clinics that do not resemble private medical clinics. Such a result would be ludicrous, given that there is a separate, express exception for facilities operated by government agencies, in MCL 211.7m.[12] Nevertheless, it is clear that no privately-operated clinic, even if a non-profit clinic, could satisfy the requirements for the Public Health Exception, as construed by the Court of Appeals.

If non-profit clinics in Michigan are categorically prevented from obtaining exemption from property taxes, the losses sustained by such clinics will grow and may well become prohibitive. As described above, non-profit clinics are experiencing losses, because the clinics offer services to a population that often do not otherwise have access to medical services. Closures of non-profit clinics will decrease access to health care, particularly for the uninsured and underinsured patients, the patient for whom access to health care is already limited.

The faulty interpretation of the statutes affording property tax exemption by the Court of Appeals should not be permitted to have such an effect upon health care in Michigan.

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[12] In any case, it does not seem possible to reconcile the providing of public health services on the mass basis required by the Court of Appeals, with, for example, administering immunizations to individuals.

Respectfully submitted,

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